Supreme Court, U. S.
FILED
SEP 9 1980
MICHAEL RODAK, JR., CLERK

No. 79-2044

In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., APPELLANTS

v.

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2044

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., APPELLANTS

v.

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over this appeal because plaintiffs failed to file their notice of appeal within sixty days after entry of judgment in the district court.

2. Whether a program of the City of New York, carried out under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. II) 2701 *et seq.*, to provide remedial educational services, is consistent with the requirements of the Establishment Clause of the First Amendment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions and statutes involved	1
Statement:	
A. Proceedings below	3
B. The Title I program	5
C. New York City's Title I program	7
D. The decision of the district court	11
Argument	13
Conclusion	20
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Americans United for the Separation of Church and State v. *Blanton*, 433 F. Supp. 97, aff'd, 434 U.S. 803	16
California-Pacific Utilities Co. v. *United States*, 410 U.S. 962	13
Committee for Public Education v. *Nyquist*, 413 U.S. 756	12
Committee for Public Education and Religious Liberty v. *Regan*, No. 78-1369 (Feb. 20, 1980)	15
Da'Ville v. *Wise*, 470 F.2d 1364	14
Fallen v. *United States*, 378 U.S. 139	14
Lemon v. *Kurtzman*, 403 U.S. 602	16
Levitt v. *Committee for Public Education*, 413 U.S. 472	12
Meek v. *Pittenger*, 421 U.S. 349	12, 15, 17, 18, 19
Nebraska State Bd. of Education v. *School District of Hartington*, 409 U.S. 921	17
Public Funds for Public Schools v. *Marburger*, 358 F. Supp. 29, aff'd, 417 U.S. 961	15

PREVIOUS PAGE WAS BLANK

Cases—Continued

	Page
Richardson v. *Green*, 130 U.S. 104	14
Scarborough v. *Pargoud*, 108 U.S. 567	13
Tilton v. *Richardson*, 403 U.S. 672	11, 15
Walz v. *Tax Commission*, 397 U.S. 664	17
Ward v. *Winstead*, 400 U.S. 1019	13
Wheeler v. *Barrera*, 417 U.S. 402	6, 11, 15
Wolman v. *Walter*, 433 U.S. 229	11, 15, 17

Constitution, statutes, regulations, and rules:

United States Constitution, First Amendment	1, 11
Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119	4
Section 7, 90 Stat. 1120	4
Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677	4
Elementary and Secondary Education Act of 1965, as amended by the Education Amendments of 1978, 20 U.S.C. (Supp. II) 2701 *et seq.*	1
20 U.S.C. (Supp. II) 2701	2, 5
20 U.S.C. (Supp. II) 2733	5
20 U.S.C. (Supp. II) 2734(a)	5
20 U.S.C. (Supp. II) 2734(m)	6-7
20 U.S.C. (Supp. II) 2736(c)	6
20 U.S.C. (Supp. II) 2740(a)	2, 6, 8
20 U.S.C. (Supp. II) 2740(b)(1)	2-3
20 U.S.C. (Supp. II) 2740(b)(2)	3
28 U.S.C. 2101(b)	13
28 U.S.C. (1970 ed.) 2282	4
45 C.F.R. 116.40	6
45 C.F.R. 116.42	7
45 C.F.R. 116a.19(c)	6
45 C.F.R. 116a.23(f)	6
Fed. R. App. P. 43	4
Fed. R. Civ. P. 25	4
Sup. Ct. R. 10	13
Sup. Ct. R. 11	13

Miscellaneous:

S. Rep. No. 146, 89th Cong., 1st Sess. (1965)	5

Pursuant to Rule 16 of the Rules of this Court, the Solicitor General, on behalf of the federal appellees, moves that the appeal be dismissed, or, in the alternative, that the judgment of the three-judge district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-48a), is reported at 489 F. Supp. 1248.

JURISDICTION

The judgment of the district court was entered on April 30, 1980 (J.S. App. 49a-50a). The notice of appeal was evidently mailed on May 27, 1980 (App., *infra*, 5a; J.S. App. 51a-52a), but it was not recorded as filed until July 15, 1980 (see App., *infra*, 2a). The Jurisdictional Statement was filed on June 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The Elementary and Secondary Education Act of 1965, as amended by the Education Amendments of 1978 (20 U.S.C. (Supp. II) 2701 *et seq.*), provides in pertinent part:

---

[1] As explained at pages 13-14, *infra*, we question this Court's jurisdiction.

Section 2701. In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. * * *

Section 2740(a). To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate * * *. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) (1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally

deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Commissioner shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Commissioner determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

STATEMENT

A. Proceedings Below

Appellants, a group of taxpayers and a taxpayer organization, commenced this action on February 25, 1976, to challenge the constitutionality of Title I of the Elementary and Secondary Education Act of 1965, insofar as it authorizes the expenditure of federal funds to finance the provision of remedial services by local public school districts to non-public school students on the premises of their schools during school hours. Appellants sought both declaratory relief and an injunction to prohibit the expenditure of public funds for this purpose.

The parties originally named as defendants included the Secretary of Health, Education, and Welfare and the United States Commissioner of Edu-

cation [2] and the Chancellor of the Board of Education of the City of New York.[3] In addition, two groups of parents and non-public school students were permitted to intervene as defendants by order of the district court dated February 2, 1977.

Following the convening of a three-judge court pursuant to 28 U.S.C. (1970 ed.) 2282,[4] and the denial, on March 3, 1978, of appellants' alternative motions for summary judgment or a preliminary injunction (446 F. Supp. 193), the district court heard evidence concerning the administration of the challenged program at both the federal and the local levels. On the basis of that evidence, the court concluded that the uncontested evidence presented to it established that the program, as administered by the Board of Education of the City of New York, had a secular purpose and did not have a primary effect of advancing religion or involve excessive administrative or political entanglement of the public authorities with the non-public schools. The court therefore held that the program, as administered in New York City, did not violate the Establishment Clause.

---

[2] These two officials were responsible for federal administration of the Elementary and Secondary Education Act. Their role has since been assigned to the Secretary of Education (Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677), and she has accordingly been substituted as an appellee in this case. See Fed. R. Civ. P. 25 and Fed. R. App. P. 43.

[3] The Chancellor is responsible for administration of all Title I remedial education programs undertaken by the Board of Education of the City of New York (Exh. U, Tab. A-4, ¶ 27).

[4] This statute was repealed by the Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. Section 7 of the 1976 Act (90 Stat. 1120) provides that it does not affect actions commenced prior to the date of enactment.

B. The Title I Program

The Elementary and Secondary Education Act of 1965 was enacted to address the effects of poverty on educational underachievement. 20 U.S.C. (Supp. II) 2701.[5] Title I of the Act provides federal reimbursement for programs, proposed and administered by local public school districts (local educational agencies, or "LEA") to assist children in low-income areas to overcome learning deficiencies. Typically, these programs involve remedial education as well as clinical and guidance services for the children (J.S. App. 15a, 16a).[6]

Under the terms of the statute, children who reside in low income areas and who meet objective criteria of educational underachievement are eligible to participate in such programs. 20 U.S.C. (Supp. II) 2734(a), 2733. The statute is intended to benefit children enrolled in public and in non-public schools; the local public school districts are admonished to ensure "equitable" participation in their Title I programs by eligible children from the non-public schools.

---

[5] As the Senate Report noted, the Act was intended to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 146, 89th Cong., 1st Sess. 5 (1965).

[6] Under Title I, the local public school district proposes to the state public school authorities educational programs that it deems appropriate for overcoming learning handicaps of eligible children within the district. The state agency is authorized to approve those local programs that provide adequate assurance of effectiveness; the expenses of the approved programs are then reimbursed by federal monies transferred to the state public education agency, which in turn disburses the funds to the local public school districts (J.S. App. 9a).

20 U.S.C. 2740(a). See *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974).[7]

The governing regulations require that Title I services be provided at those locations where the needs of the children can best be met (45 C.F.R. 116a.19(c)). Since the local public school district must provide for the equitable participation of eligible children from non-public schools, the Title I services may, at the option of the local district, be provided on the premises of the non-public school (J.S. App. 10a). The Act and regulations contain a number of specific restrictions to ensure that the public school district retains direct control of all such programs and that none of the monies or equipment employed to provide Title I services goes to the non-public schools themselves (J.S. App. 11a). For example, payments are authorized only to finance the cost of programs that will supplement, rather than replace, programs the schools would have provided in the absence of Title I funds (20 U.S.C. (Supp. II) 2736(c); 45 C.F.R. 116a.23(f), 116.40); all Title I services must be provided solely by publicly employed personnel (45 C.F.R. 116.42), who may be made available other than on public school premises only to the extent necessary to provide services to those educationally deprived children for whom the Title I projects were designed (45 C.F.R. 116a.23(f)). Moreover, Title I funds and property must be administered and controlled by the public school authorities (20 U.S.C. (Supp. II)

---

[7] Nationwide, approximately 5,000,000 children are enrolled in programs funded under Title I, of whom about 200,000, or 4%, are students in non-public schools (J.S. App. 13a). The Title I budget for fiscal year 1980 is estimated to be $2,600,000,000, of which $105,200,000, or 4%, will be expended on services for eligible children who are not enrolled in public schools (J.S. App. 13a; Exh. U, Tab. A-1, ¶ 3).

2734(m)), who must maintain both title to and sole physical control of the property, and must remove it from the premises of the nonpublic school, if necessary, to prevent its being used for any purpose other than as part of the Title I project (45 C.F.R. 116.42).

The local school district submits to the state a plan describing in detail the manner in which its Title I program is carried out (Exh. T, ¶¶ 10-12).[8] In turn, the state submits a triannual monitoring and enforcement plan to the federal government, which includes a description of how the state will monitor the performance of the local districts and specific assurances that the provision of services will comply with all Title I rules and regulations (Tr. 55).

Apart from regular field supervision by the public school district of its own Title I teachers and other professionals (J.S. App. 17a-18a), both the state and the federal Department of Education carry out periodic inspections to ensure not only that the services funded under the Act are being provided, but also that the very strict rules that assure the purely secular nature of the program and its independence from the non-public schools are being observed (Tr. 55). This monitoring is solely of the performance of the Title I personnel—that is, the public employees—and does not involve any inquiry into the manner in which the non-public school conducts its own affairs (J.S. App. 44a).

C. New York City's Title I Program

The New York City Board of Education, as the public school district for the City, administers the largest Title I program in the country (J.S. App.

---

[8] Pursuant to a pretrial agreement, most of defendants' evidence was presented in the form of a narrative summary, introduced as Exhibit T.

13a).[9] For the 1978-1979 school year, a total of 404,686 public and non-public school children were eligible for Title I services in New York City, of which 33,285, or approximately 8.2%, were enrolled in non-public schools (J.S. App. 14a).[10] Due to budget limitations, only a portion of the eligible children could receive services, and, as a consequence, approximately 13,265 non-public school children were expected to participate in the Title I program (J.S. App. 14a).

Eligibility for participation in the Title I program requires that the child reside in a low-income area and be educationally deprived. The Board has established objective standards to measure both of these statutory criteria, without regard to whether the child is attending a public or non-public school (Exh. T, ¶¶ 35-41).[11] Consistent with the statutory require-

---

[9] The remedial services supplied under Title I by the New York City Board of Education include a corrective reading program, a reading skills program, a corrective mathematics program, and a program to teach English as a second language. In addition, the Board provides psychological, guidance and counselling services for those Title I children whose ability to take advantage of the remedial program is impaired by emotional, family or related problems (J.S. App. 16a).

No services are provided under Title I that would otherwise be supplied by the schools attended by the eligible children, regardless of whether they are public or non-public. Indeed, no remedial services are provided for non-public school students until the Board specifically determines that such services are not being provided by the school (J.S. App. 15a).

[10] Accordingly, approximately 8% of the Title I funds are directed to children enrolled in non-public schools (J.S. App. 24a). See 20 U.S.C. (Supp. II) 2740(a).

[11] In determining whether a child in a non-public school is educationally deprived, the Title I teacher administers Board-approved tests to measure achievement levels (Exh. T. ¶ 63 (d)).

ment that Title I services be provided in the location where the needs of the children can best be met, those services are typically provided to the children on the premises of their school, whether public or non-public, during school hours. This course has been followed because prior experience by the Board of Education with off-premises and after-hours Title I programs proved such programs ineffective in serving the remedial purposes of Title I (J.S. App. 14a-15a).[12]

All teachers and other professionals who provide services under Title I are regular salaried employees of the Board, and are subject solely to its supervision and control (J.S. App. 16a). Their religious affiliation has no bearing on their assignment to the non-public school Title I program (J.S. App. 16a-17a). Similarly, religious faith or affiliation has no effect on the decision to assign a teacher to a particular non-public school (*ibid.*).[13] The vast majority of Title I personnel work in more than one non-public school each week (J.S. App. 17a).

---

[12] Lack of student attendance, inability to recruit teachers for such programs, logistical problems, and parent resistance all contributed to the failure of such alternatives for non-public school children (J.S. App. 14a). The same problems were found by the United States Office of Education in its study of similar arrangements in the State of Missouri (J.S. App. 12a-13a).

[13] Although a substantial majority of the Title I teachers who provide remedial services to eligible children on the premises of non-public schools have a different religious affiliation from that of the schools at which they conduct their classes (J.S. App. 17a), there is no known instance of any non-public school authority even suggesting to the Board that a Title I teacher be transferred or removed for religious reasons (J.S. App. 17a).

All Title I personnel who perform any services on the premises of non-public schools are given specific written rules of procedure that detail the requirements that all such services are to be provided solely by them and solely pursuant to the direction and authority of the Board (J.S. App. 17a).[14] Moreover, these requirements are further emphasized orally when the teachers are given their orientation interviews and in-service training by their supervisors (J.S. App. 17a).[15] Since the Title I teachers are answerable only to the Board, they have only minimal contact with the principal of the non-public school (J.S. App. 44a). The Title I teachers' contacts with the faculty of the non-public school are also limited (J.S. App. 17a); there is an explicit prohibition on team teaching, or any other participation by Title I

---

[14] For example, when Title I services are provided to eligible children on the premises of non-public schools, the room used is required to be free of all religious symbols or representations (J.S. App. 18a). Usually that room is reserved solely for use by the Title I personnel and is closed or locked when not in use for that purpose (J.S. App. 18a; Exh. T, ¶ 86). Moreover, the Board requires that all equipment and materials used in the Title I program—all of which are chosen by the Board—be clearly labelled as Title I property and be locked in cabinets or similar safe places when not being used by the Title I teachers (J.S. App. 18a; Ex. T, ¶ 81).

[15] Supervision of the Title I teachers is by the Board's own supervisory personnel, who make periodic classroom visits to review teaching techniques and also to ensure that the Title I teachers are adhering to the Board's rules of total independence from the non-public school administration (J.S. App. 17a-18a). In addition, both the state and the federal Department of Education representatives on occasion make field inspections to observe the performance of the Title I personnel and review the manner in which the Board is administering the program (Tr. 55).

teachers in the internal functions—whether educational or religious—of the non-public school (*ibid.*).[16]

D. The Decision of the District Court

The district court emphasized (J.S. App. 8a, 47a-48a) that it was considering only the constitutionality of Title I programs administered by the Board of Education of the City of New York, in light of this Court's admonition that First Amendment challenges to aid-to-education programs must be determined on a case-by-case basis by careful examination of the manner in which the particular program is designed and administered (*Wheeler* v. *Barrera*, *supra*, 417 U.S. at 426-427; *Tilton* v. *Richardson*, 403 U.S. 672, 681-682 (1971)).

Applying the traditional tripartite test for educational aid programs challenged under the Establishment Clause,[17] the court held that the purpose of Title I was to improve the educational performance of underprivileged children, a clearly secular goal, and that the primary effect of the statute was secular (J.S. App. 20a-37a). The court relied upon the fact that Title I, on its face and as implemented in New

---

[16] Title I teachers do consult on an informal basis with the regular teachers of each participating child to obtain necessary information about his academic performance and problems. This informal consultation, an essential part of the remedial process, must occur whether or not the child attends a non-public school, and wherever the Title I classes are held (*e.g.*, Exh. U, Tabs A-6, ¶ 20; A-7, ¶ 16; A-8, ¶ 16).

[17] As stated in *Wolman* v. *Walter*, 433 U.S. 229, 236 (1977):

> In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.

York City, provides educational assistance directly to children in need, and not to any school or other institution; that the services provided do not directly or indirectly aid the non-public schools by financial contributions or substitution for services otherwise provided by those schools; that the program is directed to all children in need rather than solely to non-public school children (who in fact constitute a small minority of its beneficiaries); that the federal regulations and implementing procedures of the Board of Education specifically regulate the activities of Title I personnel and the use of Title I equipment, preventing their diversion to any activity other than the Title I program; and that those non-public schools on whose premises the Title I services are provided do not adhere to this Court's profile of the "pervasively sectarian" school.[18] Most importantly, the Court emphasized the fourteen-year experience with Title I, which was documented in detail in the record. That documentation revealed both a complete separation between the publicly-staffed Title I services and the activities of the schools, and an absence of any evidence that religion has ever intruded itself in any way into the operation of Title I.

For similar reasons, the court held that Title I did not involve excessive administrative or political en-

---

[18] The district court derived that "profile" from *Meek* v. *Pittenger*, 421 U.S. 349, 356 (1975); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 767-768 (1973); and *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 476 (1973) (J.S. App. 29a). The court found that the New York schools did not fit the profile because they do not restrict student admission or teacher hiring on religious grounds, do not attempt to compel their students to accept or obey the doctrines of the sponsoring church or religious organization, and do not impose religious restrictions on the content of secular instruction (J.S. App. 31a).

tanglement between government and religious institutions (J.S. App. 39a-47a). The court also concluded that there was no evidence that Title I had ever generated any political strife along religious lines and no reason to anticipate such problems, because the program assists children in need without regard to their school enrollment, and does not require legislative appropriations that earmark separate funds for public and non-public schools or for the children attending public and non-public schools (J.S. App. 46a-47a).

ARGUMENT

1. The appeal should be dismissed for want of jurisdiction. 28 U.S.C. 2101(b) provides that a direct appeal from the district court to this Court, except from a final judgment holding unconstitutional an Act of Congress, "shall be taken" within sixty days from entry of the judgment. Rule 10 of the Rules of this Court prescribes the method by which an appeal is to be taken; that Rule requires the filing of a notice of appeal with the clerk of the federal court from which the appeal is taken. Failure to accomplish this task within the required sixty days deprives this Court of jurisdiction to entertain the appeal. *E.g.*, *California-Pacific Utilities Co.* v. *United States*, 410 U.S. 962 (1973); *Ward* v. *Winstead*, 400 U.S. 1019 (1971). See Sup. Ct. R. 11. See also *Scarborough* v. *Pargoud*, 108 U.S. 567, 568 (1883).

In this case, the final judgment of the district court was entered on April 30, 1980, thus requiring the appeal to be filed by June 29, 1980. A review of the docket sheet in the district court discloses, however, that the notice of appeal was not filed until July 15, 1980 (App., *infra*, 1a). On their face,

therefore, the records of the district court indicate that this appeal was not timely taken, thus depriving this Court of jurisdiction.

Appellants' counsel nevertheless asserts that he mailed the notice of appeal to the clerk of the district court on May 27, 1980 (App., *infra*, 5a). Copies of the notice of appeal were served on defendants' counsel at that time. The July 15 filing resulted from a subsequent delivery of a notice of appeal, after the original could not be found (*id.* at 3a-4a). In these circumstances, it may be that the May 27 mailing of the notice of appeal, in ample time for it to reach the court and be timely filed, suffices to constitute a "filing" by appellants, if this Court concludes that here, as in *Fallen* v. *United States*, 378 U.S. 139, 144 (1964), appellants "had done all that could reasonably be expected to get the letter to its destination within the required [60] days." If so, in this case, as in that one, this Court may conclude that "[s]ince [appellants] did all [they] could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of [this] appeal on the merits" [*ibid.*]. Cf. *Da'Ville* v. *Wise*, 470 F.2d 1364 (5th Cir. 1973). But see *Richardson* v. *Green*, 130 U.S. 104, 111-112 (1889).

2. If the Court concludes that it has jurisdiction of this case, then we submit that it should affirm the decision of the district court for the reasons stated by that court, which correctly applied the standards established by this Court to the essentially undisputed facts. As we demonstrate below, appellants' objections to the decision are plainly insubstantial.

a. Appellants' primary claim is that federal funding of remedial education services to children on the

premises of religious schools during school hours is *per se* unconstitutional under the Establishment Clause. That contention has been repeatedly rejected by this Court. See, *e.g.*, *Tilton* v. *Richardson*, *supra*, 403 U.S. at 681-682; *Wolman* v. *Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring). Indeed, this Court in *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 426-427, emphasized the importance of "a careful evaluation of the facts of the particular case" in refusing to consider the constitutionality of the precise aspect of the Title I program to which appellants here object. That decision is flatly inconsistent with the *per se* approach urged here.

Appellants nevertheless contend that *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D. N.J. 1973), aff'd, 417 U.S. 961 (1974), and *Meek* v. *Pittenger*, 421 U.S. 349 (1975), establish the *per se* rule they advocate. But this interpretation of *Meek* was explicitly rejected in *Committee for Public Education and Religious Liberty* v. *Regan*, No. 78-1369 (Feb. 20, 1980), slip op. 14.

b. Appellants also apparently contend (J.S. 11-12) that Title I as administered unconstitutionally "foster[s] an excessive government entanglement with religion." *Wolman* v. *Walter*, *supra*, 433 U.S. at 236.[19]

---

[19] Appellants did not contest below, and do not here challenge, Title I's satisfaction of the other two elements of the constitutional test defined in *Wolman*—a secular legislative purpose and a primary effect that neither advances nor inhibits religion (433 U.S. at 236). Such challenges would, in any event, be unavailing. The secular purpose of Title I—"to provide needed assistance to educationally deprived *children* rather than to specific schools" (*Wheeler* v. *Barrera*, *supra*, 417 U.S. at 406)—is implemented by a program carefully designed to avoid any assistance to religious schools. The record amply supports the district court's conclusion that

As described by this Court, administrative entanglement consists of "comprehensive, discriminating, and continuing state surveillance" to ensure against sectarian use of government funded equipment or programs, including "state inspection and evaluation of the religious content of a religious organization," and thus "excessive government direction of church schools and hence of churches." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619-620 (1971). The record here plainly demonstrates that the New York City Title I program involves no such entanglement.

The Title I personnel are all public school teachers or other publicly-employed specialists, whose only task is to perform purely secular remedial or guidance services for children in need. Most personnel are itinerant, spending only a part of their time in any one non-public school, and usually in a room reserved exclusively for Title I purposes. All personnel receive clear instructions not to engage in school activities, including team teaching, and all are monitored by local, state and federal inspectors, who do not, however, review in any way the operations of the non-public school.[20] The minimal contacts between Title I personnel and non-public school administrators

---

any effect of the New York program on religion is minimal. See pages 8-11, *supra*. Cf. *Americans United for the Separation of Church and State* v. *Blanton*, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 434 U.S. 803 (1977) (statute providing aid to all needy college students, including those in religious colleges, does not have prohibited effect on religion).

[20] Although plaintiffs claim in their Jurisdictional Statement that these field inspections constitute an intrusion into the operations of the non-public schools and entangle government with religion (J.S. 11-12), the undisputed evidence is to the contrary and the district court correctly so found (J.S. App. 44a).

are principally logistical in nature, and serve only to provide the public school authorities with lists of potentially eligible children, and to arrange for the schedule and location of Title I classes.[21] In short, the Title I classroom is, as the district court concluded, in effect a public school within a non-public school (J.S. App. 43a). The government's monitoring of what occurs in that classroom is no more entangling than the government monitoring of teaching at the "neutral sites" involved in *Wolman* v. *Walter*, *supra*, 433 U.S. at 248. The Title I classroom is no less such a site than is a mobile van parked at the curb next to the non-public school. See *id.* at 245 n.12. See also *Nebraska State Bd. of Education* v. *School District of Hartington*, 409 U.S. 921, 924-926 (1972) (denying certiorari) (Brennan, J.).

The record here also refutes any suggestion that Title I might cause excessive political entanglement resulting in political fragmentation along religious lines. There is simply no evidence of such a phenomenon after fourteen years of operation of the statute. Nor is this surprising since, unlike such invalidated programs as the Pennsylvania statute described in *Meek*, Title I provides assistance to all eligible children, not merely those in non-public schools (who constitute a small minority of participating children), and does not require annual appropriations of funds earmarked for non-public schools or the students attending them. A lump sum for all operations is appropriated by Congress, and the New York City Board of Education allocates the funds ad-

---

[21] The minimal administrative contacts between public and non-public authorities are similar to the type of contacts upheld in *Wolman* v. *Walter*, *supra*, 433 U.S. at 246 n.13. See also *Walz* v. *Tax Commission*, 397 U.S. 664, 674-676 (1970).

ministratively in accordance with an objective formula that ensures comparable services to needy children, whatever schools they attend (J.S. App. 46a-47a).

c. Finally, appellants contend that Title I is not meaningfully distinguishable from the state program invalidated in *Meek* v. *Pittenger*, *supra*. They are wrong. First, the program in *Meek* was directed solely to non-public school children, 421 U.S. at 352-353, 364, whereas under Title I these children are a small minority of the participants. As noted, this difference significantly decreases the potential for political fragmentation (compare 421 U.S. at 372 with J.S. App. 46a-47a).

Second, in *Meek* the evidence as to how the program was intended to be operated was sparse, and did not demonstrate that assurance against sectarian influence on the remedial classes could be achieved without involving the state in monitoring the internal operations of the non-public schools; thus, this Court noted that the program relied, for its assurance against sectarian influence, solely on the "good faith and professionalism" of the remedial teacher (421 U.S. at 369).[22] In striking contrast, the evidence here

---

[22] Moreover, the schools in *Meek* were pervasively sectarian (421 U.S. at 371), thus apparently increasing the danger of sectarian pressures being exerted on the remedial teachers. In contrast, the evidence here demonstrated, and the court found, that the non-public schools on whose premises Title I services are dispensed in New York do not exhibit the principal characteristics of the pervasively sectarian school and that none of the Title I teachers had ever experienced such pressures (J.S. App. 40a).

Plaintiffs argue at length in their Jurisdictional Statement that the evidence established that the non-public schools in question in New York do fit the pervasively sectarian profile

demonstrates beyond question that the New York City Title I program is so designed and administered that, as the district court held, it poses neither a cognizable danger of sectarian influence, nor any need for interference with the internal operations of the non-public school (J.S. App. 41a-45a).[23]

Third, the challenged program in *Meek* had only been enacted the year before, and there was simply no evidence as to whether in practice the program could be operated free of either sectarian interference with the public school teachers or government interference with sectarian institutions. In this case, in contrast, there is a fourteen-year record, fully documented below and demonstrating a complete absence of any evidence of such interference. There was no showing that Title I services or equipment have ever been used for non-Title I purposes, that there ever was any attempt to do so, or that the means em-

---

(J.S. 9-11). This is untrue, as the district court's opinion makes clear. (J.S. App. 30a-32a). The testimony of Dr. John Ellis cited by plaintiffs was entirely hypothetical in nature (see Tr. 40-65), and constituted no more than the repeated statement that the Department of Health, Education, and Welfare would not prohibit use of federal funds to pay for Title I services even if the school on whose premises the services were provided did adhere to the profile. The uncontradicted evidence below, however, established that the New York non-public schools affected do *not* fit the profile.

[23] For example, the record here shows that all remedial teachers visit a number of schools, usually of a different religious persuasion than their own. This lack of professional or personal identification with any particular school minimizes the risk involved in "performing important educational services in schools in which education is an integral part of the dominant sectarian mission" that concerned the Court in *Meek, supra*, 421 U.S. at 371.

ployed by the Board of Education to protect against such abuse have ever involved any interference with the non-public schools.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. If the Court concludes that the notice of appeal was timely filed, the judgment of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

APPENDIX

TENNEY, J.

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BLANKINSHIP, JOHN D., CORBETT, JACK, FLAST, FLORENCE, FORDHAM, JEFFERSON, GUNN, ANDREW LEE, HELLER, HELEN C., NEIER, ARYEH, RYOR, JOHN, SHANKER, ALBERT, SQUADRON, HOWARD M., WAMBLE, G. HUGH and WOOD, JAMES E., PLAINTIFFS.

v.

MATHEWS, F. DAVID—Secretary of the United States Dept. of Health, Education, and Welfare; BELL, TERREL H.—United States Comissioner of Education; and ANKER, IRVING—Chancellor of the Board of Education of the City of New York, DEFENDANTS.

Cause: Action for injunction and declaratory judgment.

Attorneys

Leo Pfeffer
15 East 84th Street
New York, N.Y. 10028
tele: (212) 879-4500

AUSA Michael H. Dolinger-791-1959
W. Bernard Richland
Municipal Bldg. NY 10007

DATE	NR.	PROCEEDINGS
02-25-76	1	Filed complaint and issued summons.
03-01-76	2	Filed Summons with Marshal's Return. Served: Terrel H. Nell by Certified Mail #285700, 2/26/76 Atty Gen. Wash. D.C. " " #555891 " " "
		* * * *
4-18-80	49	Fld Opinion #49942, that the Court concludes that NYC Title I program does not violate the 1st Amendment's prohibition against the establishment of religion, no constitutional infirmity has been revealed on the facts of this case, accordingly, both the statute and the City's program survive judicial scrutiny, Van Graafeiland, CJ, Tenney, J. Broderick, J. mn
4-30-80	50	Fld Judgment that the defts have judgment dismissing the complaint, Clk mn
7-15-80	51	Fld pltff's Notice of Appeal to the Supreme Court of the U.S. from judgment on 4-30-80, mn to Robert B. Fiske, Jr. US Atty, W. Bernard Richland, Howard I. Rhine, Dennis Rapps, David J. Martin, Williams & Connolly, and Martin, Obermaier & Morvillo.

LEO PFEFFER
ATTORNEY AT LAW
15 E. 84 Street
New York 26, N.Y.
TRAFALGAR 9-4500

July 3, 1980

Michael Rodak, Jr., Clerk
United States Supreme Court
Washington, D.C. 20543

Re: National Coalition for Public Education and Religious Liberty, et al. v. Shirley M. Hufstedler, Secretary of the United States Department of Education, et al.

Dear Sir:

On June 27th, while I was out of town, my secretary received a call from your office requesting that I serve three copies of the Jurisdictional Statement in this case on the Solicitor General, and that I send to your office a copy of the Notice of Appeal showing the date when it was filed. I have mailed the three copies to the Solicitor General.

I went to the office of the Clerk of the District Court but after a thorough search, the original Notice of Appeal could not be found. I thereupon sent to the Clerk's office a duplicate copy of the Notice of Appeal.

I immediately went to the offices of the U.S. Attorney for the Southern District and of the Corporation Counsel of the City of New York, both defendants in the action, and ascertained from them that they had received copies of the Notice of Appeal

served upon them by mail. I enclose photostat copies showing the date (May 29) when they had received the Notice of Appeal.

I enclose herewith copies of the relevant correspondence and of the Notice of Appeal, showing receipt of them by the United States Attorney and the Corporation Counsel.

I trust this satisfactorily clears up the matter.

Very truly yours,

LEO PFEFFER
Attorney for Appellants

Encl.

May 27, 1980

Raymond F. Burghardt, Clerk
United States District Court
Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007

Re: National Coalition for Public Education and Religious Liberty, et al. v. Patricia R. Harris, Secretary of the United States Department of Health, Education and Welfare, et al.
76 Civ. 888

Dear Sir:

I enclose herewith, for filing, the Notice of Appeal with proof of service in the above entitled case.

Yours truly,

LEO PFEFFER
Attorney for Plaintiffs-Appellants

Encl.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 327373 59